No. 108 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S REPLY TO NEBRASKA'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Ide v. United States, 263 U.S. 497 (1924)	6
Nebraska v. Wyoming, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953)	2,5,6,7
Ramshorn Ditch Co. v. United States, 269 F. 80 (8th Cir. 1920)	6
United States v. Haga, 276 F. 41 (D. Idaho, 1921)	6
United States v. Tilley, 124 F.2d 850 (8th Cir., 1941), *cert. den.*, 315 U.S. 691 (1942)	6
Wyoming v. Colorado, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957)	2
MISCELLANEOUS:	
Lewis Carroll, *Through The Looking-Glass*, ch. 6 (1872)	4

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INTRODUCTION

Only the first of Nebraska's exceptions, that which relates to the Laramie River, implicates the interests of the Basin Electric Power Cooperative (Basin). Nebraska's other two exceptions involve the special master's conclusions concerning the application of ¶¶ X and XIII(c) of the decree to Wyoming's proposed Deer Creek project. Basin takes no position with respect to these exceptions.[1]

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[1] It strikes Basin, however, that the interpretation of ¶ X urged by Nebraska is strained somewhat beyond the point of herniation and that her argument founded on XIII(c) assumes

ARGUMENT

Nebraska's exception relating to the Laramie and her argument in support are bottomed on the propositions that the water of the Laramie is not wholly apportioned between Colorado and Wyoming by the decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957), and that under the decree here, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953), she is apportioned Laramie water because Special Master Doherty and the Court, in estimating the quantity of natural flow water available for apportionment in the section of the North Platte between Guernsey (or Whalen) and Tri-State Dams, tabulated some inflow from the Laramie.

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that the decree is open to modification in this case. Indeed, contrary to the assurance she gave the Court at the threshold that she did "not seek to modify the Decree in any respect, but only to enforce it," Neb's Reply to Wyo's Br. in Opposition 2 (Jan. 15, 1987), Master's Docket Document Number (Doc. No.) 4, she currently characterizes her petition as one "to reopen" the decree and "to modify it as necessary by the addition of appropriate provisions." Neb's Br. on Exceptions 2-3 (July 1, 1992). The decree as it stands places no restrictions on Wyoming's use of the water of tributaries entering the North Platte in the reach of the river where the proposed Deer Creek project is located. While the Court expressly retains jurisdiction, in an action authorized for the purpose of modifying the decree, to consider "the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir," this action is authorized only for the purpose of permitting Nebraska to enforce the decree and Wyoming's proposed Deer Creek project is challengeable here only if it is in violation of the decree as it stands.

In his Second Interim Report, Special Master Olpin bases his conclusion that Nebraska has "equities" in the Laramie on the same propositions. Second Int. Rep. 64. Nebraska excepts to the special master's report for failing to recommend that she be granted summary judgment "that 75% of the flows of the Laramie was expressly apportioned to Nebraska" by the decree. Neb's Br. on Exceptions 32 (July 1, 1992). The fallacy of these propositions is shown in the briefs on exceptions filed by Wyoming and Basin. Wyo's Br. on Exceptions (July 2, 1992); Basin's Br. on Exceptions (July 1, 1992). The decree in *Wyoming v. Colorado* expressly provides that Wyoming shall have the right to divert and use all water remaining in the Laramie after Colorado's rights are satisfied and the decree here excludes the waters of the Laramie from its operation. *See* Basin's Br. on Exceptions 20-26 (July 1, 1992). The special master's conclusion that Nebraska has "equities" in Laramie water and Nebraska's contention that she has rights in Laramie water are incompatible with the plain language of the decrees.

It is undisputed that natural flow water from the Laramie and all other sources that actually gets into the section of the North Platte between Guernsey and Tri-State during the irrigation season is subject to apportionment as provided in ¶¶ IV and V of the decree. But, based on the premise that the apportionment of Laramie water made by the decree in *Wyoming v. Colorado* does not extend below the Wheatland project and the circumstance that, in estimating the quantity of natural flow in the Guernsey to Tri-State section, Special Master Doherty tabulated some inflows from the Laramie, Nebraska contends

that she is possessed of an "express" right to have all water in the Laramie below the Wheatland project flow unvexed into the North Platte. Neb's Br. on Exceptions 19, 32, 54.[2] She would thus transmogrify her apportionment of 75% of the natural flow water *in* the Guernsey to Tri-State section of the North Platte into an entitlement to call Laramie water into that section.

In aid of her contention that the inflows from various sources that were assumed in estimating the quantity of water available for apportionment were themselves apportioned or in some way dedicated and assured to reach the North Platte, Nebraska makes much of the treatment of Spring Creek. She says:

> The Court would not have expressly included the Spring Creek inflows (3% of the supply), which Doherty inadvertently left out because of an omission in Wyoming Exhibit No. 148, and have simultaneously excluded the Laramie (26% of the supply), which Doherty had expressly included. In other words, the fact that the Court bent over backwards to expressly include 3% of the apportioned supply proves that the Court necessarily recognized

[2] "Express" means "directly and distinctly stated or expressed rather than implied or left to inference; not dubious or ambiguous: Definite, Clear, Explicit, Unmistakable." "Expressly" means "in direct or unmistakable terms: in an express manner: Explicitly, Definitely, Directly." Webster's Third New International Dictionary 870 (1976). Seemingly, like Humpty Dumpty, when Nebraska uses a word "it means just what [she] choose[s] it to mean—neither more nor less." Lewis Carroll, *Through The Looking-Glass*, ch. 6 (1872).

> the prior inclusion of the Laramie inflows, *i.e.*, 26% of the apportioned supply.

Neb's Br. on Exceptions 30-31.[3]

Spring Creek enters the North Platte in the one-mile stretch of the river between the Wyoming-Nebraska line and Tri-State Dam. In computing the requirements of the Tri-State Canal, including the Ramshorn Canal which receives its supply through the Tri-State Canal, Special Master Doherty had deducted return flows below Tri-State Dam which were intercepted and utilized by the canal. He had not deducted the accretions from Spring Creek. The Court agreed with Wyoming that the accretions from Spring Creek should be taken into account in computing Nebraska's requirement of water from Wyoming and so provided in the decree. 325 U.S. at 648, 666.

The essential—if unarticulated—premise of Nebraska's Spring Creek argument is that the inflows estimated from Spring Creek are guaranteed to the North Platte to be available for division in accordance with the apportionment. She argues, *a fortiori*, that

[3] Although reluctant to take a hand in Nebraska's three-card monte game of percentages, Basin notes that Nebraska's figures were derived by excluding the estimate of the natural flow coming in from above Guernsey which, during the decade of the 1930s, averaged about 410,000 acre feet annually. Doherty Report 71, table IV (average of amounts shown in "Natural Flow" column). When the natural flow from above Guernsey is included, the estimated inflow from the Laramie amounts to about 4.6% and that from Spring Creek to less than .6% of the total natural flow water estimated to be available. Of the total supply, including storage water, estimated to be available, the inflow estimated from the Laramie, 23,230 acre feet, makes up about 2%. *Cf.* Doherty Report 67, table III.

the larger estimated inflows from the Laramie are so dedicated and assured. But the premise is patently false. None of the inflow from the various sources considered in the estimating the quantity of water that would be available for division in accordance with the apportionment is committed or guaranteed in any way. Certainly not that of Spring Creek.

As Nebraska observes, the water which finds its way into Spring Creek is drainage or return flow from lands irrigated under the Interstate Canal. Neb's Br. on Exceptions 29. The Interstate Canal is a North Platte Project canal diverting North Platte water at Whalen. It runs on the north side of the river and extends a considerable distance into Nebraska. *See* 325 U.S. at 595.

Whatever its volume, the contribution of Spring Creek tabulated in estimating the quantity of water available for apportionment is by no means committed or assured to the North Platte. The United States can cut it off any time by deciding to recapture the water for reuse on the North Platte Project. *Ide v. United States*, 263 U.S. 497 (1924); *United States v. Tilley*, 124 F.2nd 850 (8th Cir., 1941), *cert. den.*, 316 U.S. 691 (1942); *Ramshorn Ditch Co. v United States*, 269 F. 80 (8th Cir. 1920); *United States v. Haga*, 276 F. 41, 43 (D. Idaho, 1921). In *Tilley* the United States secured an injunction against Nebraska's interference with its right to collect seepage water from the irrigation of lands in the Pathfinder Division of the North Platte Project for carriage and reapplication to further beneficial use on lands in the Northport Division of the project. Applying Nebraska law, the Eighth Circuit held:

> [A]n appropriator of public waters for use under an irrigation project or canal is entitled to collect seepage waters upon any part of the lands under such project or canal, by means of drains or ditches, and to apply them to further beneficial use upon any of the lands under such project or canal.

124 F.2d at 858.

The rule of *Ide* and *Tilley* is affirmed and discussed in the decision upon which the decree here is based. 325 U.S. at 634-636.[4] Return flow water is not abandoned to the stream from which it was originally diverted before it actually gets back into the stream. Before it does, the canal owner retains control over it. *Id.* at 637. As the flows of Spring Creek are clearly not guaranteed to the North Platte, Nebraska's argument by analogy that the flows of the Laramie must be so committed is anchored in air. Just as the flows of Spring Creek before reaching the North Platte remain subject to a prior right of disposition of the United States, those of the Laramie remain subject to a prior right of disposition of the State of Wyoming.

It is undisputed that, during the irrigation season, natural flow water in the section of the North Platte from Guernsey to Tri-State, whether coming in from above or below Guernsey, is subject to apportionment

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[4] Special Master Doherty's tabulations of priorities, acreages, and water requirements for the canals heading in the Guernsey to Tri-State section take the *Tilley* decree into account in relation to the Tri-State and Northport Canals. *See* Doherty Report 86-87, table 17, nn.1 & 3. Doherty's table is set forth in the Court's opinion. 325 U.S. at 648-49.

in accordance with ¶¶ IV and V of the decree. But upon entering this section of the river, water comprising natural flow loses its identity as Laramie water or Spring Creek water or return flow water or water from any particular source. It is simply natural flow water. The decree does not, as Nebraska would have it, *see, e.g.*, Neb's Br. on Exceptions 27, 28, apportion any flows in the North Platte or its tributaries outside of the Guernsey to Tri-State section. It apportions only natural flows *in* that section.[5]

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[5] To be sure, it places certain restrictions on the use and storage of water in sections of the North Platte above Guernsey to procure flows into the Guernsey to Tri-State section but it neither apportions water outside of that section nor assures inflows from particular sources or in particular amounts.

Saying that "Laramie River flows are measured near its mouth and tabulated on a daily basis," Neb's Br. on Exceptions 10, Nebraska would leave the impression that inflows from the Laramie are measured to determine the amount of natural flow water in this section of the river. This is not true. The quantity of natural flow water in the section is determined without reference to inflows from particular sources. As the special master observes, the formula for calculating the quantity of natural flow water used by all the parties is:

> 1. Calculate total supply of water in section by summing all outflows from section (all diversions plus flows passing Tri-State, all measured daily);
>
> 2. Subtract from that total supply in the section the amount of storage water (adjusted for decreed evaporative losses) in river at Whalen Dam;
>
> 3. The total natural flow supply is divided (according to the decree) 75/25.

Second Int. Rep. 61.

As concerns Nebraska, inflows from the Laramie are measured only to determine whether Basin is performing her obligations under the settlement agreement.

It does not guarantee that water from the Laramie, Spring Creek, or any other source considered in estimating the quantity available for apportionment will actually reach the North Platte.

Acknowledging again that ¶¶ 3.a and 3.b of her petition relate specifically to Grayrocks and the Corn Creek project, Neb's Br. on Exceptions 11, Nebraska concedes that she no longer contends—as she pleaded—that the operation of Grayrocks constitutes a violation of her rights under the decree. She says now that her claim is that Wyoming's adherence to the legal position that Nebraska has no rights to Laramie water that does not actually reach the North Platte constitutes a violation of her rights. *Id.* at 12. This concession entitles Wyoming to summary judgment on Nebraska's Grayrocks claim.

Nebraska attempts to breathe life into her Corn Creek claim by asserting that Wyoming admitted that Corn Creek "is an active vital project" at the oral argument on March 9, 1992. *Id.* at 13. This is a flat-out misrepresentation. What Wyoming's counsel said is:

> Mr. Cook: . . . and he [former Governor of Wyoming Hathaway, counsel for Corn Creek] asked me to declare positively the Corn Creek project, in the eyes of his client, Corn Creek Irrigation District, is an active and vital project. I say no more on whether it is alive or not.

Transcript of March 9, 1992 Hearing 72 (Doc. No. 435).

Wyoming, like Basin, has shown the substantial hurdles that currently confront the Corn Creek proj-

ect. *See* Basin's Br. on Exceptions 19-20 (July 1, 1992). But the vitality of the project is immaterial in any event because the settlement agreement to which Nebraska is a party makes provision for Corn Creek's Laramie water supply should the project ever materialize. Wyoming is clearly entitled to summary judgment on Nebraska's Corn Creek count.

CONCLUSION

Nebraska's claims involving the Laramie are not sustainable and Wyoming is entitled to summary judgement accordingly.

Respectfully submitted,

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